




FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
ACTING STAFF DIRECTOR
ACTING GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: OFFICE OF THE COMMISSION SECRETARY 

DATE: February 16, 2011

SUBJECT: Comment on Draft AO 2011-01
Robin Carnahan for Senate

Transmitted herewith is a timely submitted comment from Marc E. Elias, Ezra W. Reese and Jonathan S. Berkon of Perkins Coie regarding the above-captioned matter.

Draft Advisory Opinion 2011-01 is on the agenda for Thursday, February 17, 2011.

Attachment

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Perkins
Coie

Marc Erik Elias
PHONE (202) 434-1609
FAX (202) 654-9126
EMAIL MElias@perkinscoie.com

700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
PHONE 202.654.6200
FAX 202.654.6211
www.perkinscoie.com

February 16, 2011

BY HAND DELIVERY

Shawn Woodhead Werth
Commission Secretary
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request 2011-01

Dear Ms. Werth:

We are writing on behalf of Robin Carnahan for Senate (the "Committee") in response to the draft of Advisory Opinion 2011-01 circulated on February 11, 2011 (the "Draft"). The Committee agrees with the Draft's conclusion that "no provision of the Act or Commission regulations prohibits the establishment of such a legal defense fund to defray the Committee's legal costs ... [and that] amounts received and disbursed by the Fund are not subject to the source prohibitions, amount limitations, or reporting requirements of the Act and Commission regulations." Draft Advisory Opinion 2011-01.

The Committee, however, wishes to point out that the Draft includes a factual representation that the Committee's request did not include. On page 2, the Draft depicts the Committee as having represented that "[n]one of the individuals involved in establishing, administering, operating, *or soliciting* on behalf of the Fund would be Federal candidates or Federal officeholders." *Id.* (emphasis added). In fact, the Committee's request asserted that "[n]one of the individuals involved in establishing, administering, or operating the fund would be Federal candidates or Federal officeholders."¹ Advisory Opinion Request 2011-01. The Committee did not state any facts regarding whether Federal candidates or officeholders would *solicit* on behalf of the Fund.

¹ In an e-mail exchange with the Office of General Counsel, the Committee also averred that "[t]he campaign committee Robin Carnahan for Senate will not be soliciting any funds on behalf of the legal defense fund proposed in the committee's advisory opinion request." See Supplemental Material from Robin Carnahan for Senate (Feb. 1, 2011).

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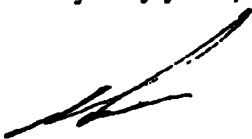
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Nothing in the Federal Election Campaign Act (the "Act") would prohibit a Federal officeholder or candidate from soliciting on behalf of the Fund. The Act only regulates solicitations made by Federal officeholders and candidates – and entities established by Federal officeholders and candidates – "in connection with an election for Federal office" and "in connection with any election other than an election for Federal office." See 2 U.S.C. § 441i(e)(1). When a solicitation is *not* "in connection with" an election, these restrictions do not apply. For example, in Advisory Opinion 2003-15 (Majette), the Commission allowed a legal defense fund "established" by a Member of Congress to raise funds not subject to the source prohibitions, amount limitations, or reporting requirements of the Act, because the fund's sole purpose was to defray the costs of litigation not "in connection with" an election.

Likewise, the costs of litigating and settling the Fox News lawsuit are not "in connection with" any election. If they were, the Fund could not solicit corporate donations to pay for such expenses. See 2 U.S.C. § 441b(a) (emphasis added) ("It is unlawful for ... any corporation organized by authority of any law of Congress, to make a contribution or expenditure *in connection with any election* to any political office."). As the Commission has already determined, a "lawsuit ... not 'in connection with' a Federal election for purposes of section 441b ... should not be considered 'in connection with' a Federal election for purposes of 2 U.S.C. § 441i(e)(1)(A)." Advisory Opinion 2003-15.

In any event, the Commission must evaluate a request based on the factual representations made by the requester, see 2 U.S.C. § 437f(a)(1); 11 C.F.R. § 112.1, and the Committee made no representation regarding the role of Federal candidates or officeholders in soliciting for the Fund. Therefore, the Committee requests that, in its final opinion, the Commission delete the word "soliciting" from the third sentence of the first full paragraph on page 2.

Very truly yours,



Marc E. Elias
Ezra W. Reese
Jonathan S. Berkon
Counsel for Robin Carnahan for Senate

cc: Christopher Hughey, Acting General Counsel